

Memorandum

To: Ken Slattery, Department of Ecology
Denise Clifford, Department of Health

From: Hugh D. Spitzer

Date: June 30, 2010

Subject: Alternate Approaches to Statutory Changes to Improve Regional Utility Service Delivery (For July 9, 2010 Meeting)

This memo briefly summarizes five alternate approaches to improving the statutory framework for creating intergovernmental entities empowered to finance, construct and/or operate utility facilities and systems on behalf of their governmental members. Additional options may become evident as the study progresses. This summary assumes that the services local governments would want to cooperate in relation to water, wastewater and/or stormwater.¹ If it would be useful at some point, we could expand on the following paragraphs and also develop a matrix comparing the various choices.

All five options are aimed at adjusting existing law to enable local governmental utility providers to improve regional facilities or services through new entities that they collectively control, if they prefer that approach rather than providing regional services through county utilities² or through separate, free-standing municipalities with independently elected boards (*e.g.*, public utility districts³ or water-sewer districts⁴). Further, all five options would be aimed at addressing some or all of the issues that have been identified, including, among others: contracting, procurement, risk management, financing, Federal tax status, governance constraints, franchises, interlocal contracting, eminent domain, grant availability, surplus property disposition, and application of nonprofit corporation laws.

¹ Intergovernmental entities for electrical energy services are not included, both because adequate statutes already exist for cooperative power generation (*e.g.*, Joint Operating Agencies under Chap. 43.52 RCW and Joint Development Agreements under Chap. 54.44 RCW), and because public utility districts formed under Title 54 RCW already provide service to wide areas that include many cities and towns.

² Chapter 36.94 RCW.

³ Title 54 RCW.

⁴ Title 57 RCW.

The five alternatives include the following:

1. **Amend/improve RCW 39.34.190-.220. (Watershed Management Partnerships).**

Amendments to this statute could enable the watershed management partnership framework to be used also for regional wastewater. Currently the law is effectively limited to water and stormwater projects and services. The amendments could also recharacterize watershed management partnerships as “public nonprofit corporations” or simply as “public corporations” and clarify which provisions of the nonprofit corporations laws do and do not apply (Title 24 RCW). Amendments could also improve the eminent domain provisions applicable to these regional entities, and clarify which procurement requirements and open government laws apply. The major disadvantage to this option is that it would not entirely dispel the confusion that has arisen concerning whether these intergovernmental entities are “truly” governmental.

2. **Provide a separate statute for intergovernmental public nonprofit corporations.**

This would be similar to Option 1, but the watershed management law would be removed from the Interlocal Cooperation Act and placed in its own chapter in Title 39 or Title 43. The current watershed management partnership law is “lost” at the end of Chap. 39.34, and a separate chapter would remedy that. In addition, a stand-alone statute for intergovernmental water/sewer/stormwater entities would need to include only those portions of the Interlocal Cooperation Act that are relevant to utility tasks. For example, a new statute could drop the option of organizing these intergovernmental entities as LLCs or partnerships, and could also provide direction on which nonprofit corporation law is to be used (*i.e.*, Chap. 24.03 or Chap. 24.06), and provide clarity as to which provisions of the relevant nonprofit corporations law are to apply. The advantage of this approach is that a watershed management partnership could point to its own statute in the Revised Code of Washington and better explain what type of entity it is. This approach would also avoid raising objections to amending Chap. 39.34 from non-water related entities that rely on its provisions and existing case law interpreting Chap 39.34. Nevertheless, these intergovernmental entities would still continue to run into occasional expressions of puzzlement about what type of government bodies they are.

3. **Adjust the “Metro” statute to provide for easier formation of regional providers.**

Metropolitan municipal corporations currently may be organized under Chapter 35.58 RCW. A “metro” is a distinct municipal corporation created by its member municipal corporations. Metros may be organized for any of the following functions: water pollution abatement, water supply, public transportation, garbage disposal, parks, and comprehensive planning. Note that stormwater and flood control are not listed functions. A public vote is required prior to formation of a metro and prior to the addition of each new function. Also, a metro may be created only if one of its member agencies is a city with a population of 10,000 or more. Chapter 35.58 could be adjusted to add stormwater and flood control, and to allow jurisdictions to form a metro even if exceeds 10,000 in population. Another change to consider would be to enable

local governments to form metropolitan municipalities *without* a public vote if the resulting metro were created without any taxing powers, *i.e.*, these would be interlocal bodies purely for utility services and relying on rates and charges imposed by its members. This could provide for the efficient formation of intergovernmental municipal corporations, controlled by their member governments, but with a clear identity and a full array of tools for carrying out specified missions.

4. Amend the joint operating agency statute to include water, wastewater and stormwater services.

Chapter 43.52 RCW permits Washington municipal corporations that provide electrical power to jointly create an “operating agency” to assist them in cooperatively acquiring, constructing, operating and owning facilities for the generation and/or transmission of electrical energy and power. An operating agency is a separate municipal corporation whose membership consists of other existing municipal corporations. It has the full range of tools necessary to carry out its mission. The only operating agency currently in existence in Washington State is Energy Northwest (formerly the Washington Public Power Supply System). Chapter 43.52 RCW could be amended to allow for the formation of similar operating agencies for water, wastewater and stormwater. The advantage is that the process would involve amendments to an existing, “known quantity” statute that already has the full array of necessary tools. The disadvantage is that the public utility districts and city-owned utilities that comprise Energy Northwest may prefer to keep “their” statute focused on a single purpose. Further, because of the financial problems encountered by Energy Northwest during the 1980s, Chapter 43.52 RCW includes several restrictions that would not be appropriate or necessary for intergovernmental providers of water and wastewater services. For example, while its board of directors is appointed by member municipalities, significant power lies with a separate executive board comprised of some appointees from the board of directors and other appointees selected by the governor and confirmed by the State Senate.

5. Draft a new operating agreement statute geared specifically to regional water, wastewater and stormwater providers.

Under this approach, the operating agreement statute at Chapter 43.52 RCW would serve as the model for a separate law that would authorize existing municipal utilities to create a regional municipal corporation to carry out specified joint functions. The statute could be simpler than Chapter 43.52, with a single board selected solely by the municipal members. The resulting entity would be clearly recognizable as a municipal corporation with an array of tools that would enable it carry out the functions entrusted to it by the members. The statute could be drafted so as to address all of the issues that are identified by the study.